Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
Open Video Systems	)	
In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58	)	CC Docket No. 87-266

COMMENTS OF THE ELECTRONIC INDUSTRIES ASSOCIATION CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION, AND CONSUMER ELECTRONICS RETAILERS COALITION

Gary Shapiro
President
Consumer Electronics
Manufacturers Association

2500 Wilson Boulevard
Arlington, Virginia 22201
(703) 907-7600

John V. Roach
Ronald L. Parrish
Tandy Corporation

1800 One Tandy Center
Fort Worth, Texas 76102
(817) 390-3779

Richard L. Sharp
W. Stephen Cannon
Circuit City Stores, Inc.
9950 Mayland Drive
Richmond, Virginia 23233
(804) 527-4014

Of Counsel:

Joseph P. Markoski
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
P.O. Box 407
Washington, D.C. 20044-0407
(202) 626-6600

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EXECUTIVE SUMMARY

The "new framework for entering the video marketplace" adopted by Congress in Section 653 of the Telecommunications Act was intended to allow common carriers to provide multi-channel video programming and information services. Congress did not intend to allow carriers to use this framework to provide basic telecommunications. Nor did Congress intend to allow incumbent cable systems to use the open video system framework as a means to avoid the comprehensive and carefully crafted regulatory regime established in Title VI of the Communications Act. Rather, Congress intended to allow cable systems to provide video programming on a common carrier's open video system. The Commission should clarify that the open video system regulatory framework can be used solely by common carriers to provide "cable service". In addition, the Commission should prohibit OVS operators from bundling open video system service with consumer premises equipment. Adoption of an unbundling rule is consistent with Congress' support, as manifested in the 1996 Telecommunications Act, of strong unbundling rules in both the cable and basic telecommunications markets. Consumer premises equipment unbundling also is necessary to implement Congress' directive to prescribe regulations that will prohibit discrimination against video programming providers who are no affiliated with open video system service providers.

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The Consumer Electronics Manufacturers Association ("CEMA"), a sector of the Electronics Industries Association ("EIA"), and the Consumer Electronics Retailers Coalition ("CERC"), hereby submit the following comments in response to the Report and Order and Notice of Proposed Rulemaking ("Notice") which the Commission issued in the above-captioned proceeding on March 11, 1996.[1]

In the Notice, the Commission requests comment on how it should implement the open video system framework established by Congress in Section

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[1] *See Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems)*, Notice of Proposed Rulemaking, CS Docket No. 96-46, and *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, CC Docket No. 87-266, FCC 96-99 (released March 11, 1996) [hereinafter "*Notice*"].

302 of the Telecommunications Act of 1996 ("Telecommunications Act").[2] As set forth more fully below, CEMA and CERC urge the Commission to clarify that the OVS regulatory framework may be used solely by common carriers seeking to provide "cable service," and that cable systems may only act as *users* of carrier-operated OVS systems. The Commission should also adopt regulations preventing OVS operators from bundling customer premises equipment.

I. INTRODUCTION AND INTEREST OF CEMA AND CERC

CEMA, a sector of the Electronic Industries Association, is the principle trade association of the consumer electronics industry. CEMA's member companies design, manufacture, import, distribute, and sell a wide variety of consumer electronics equipment, including televisions, radios, personal computers, videocassette recorders, and tape and compact disc players. In its filings before the Commission, CEMA has consistently advocated policies which promote competition, innovation, and interoperability of consumer products, thereby bringing quality, choice, and value to the consumer.

The Consumer Electronics Retailers Coalition (CERC) consists of the major retailers of consumer electronics products in the United States, and their trade associations. It includes Best Buy, Circuit City, Dayton Hudson, Montgomery Ward, Sears, Tandy, the International Mass Retailers Association, the National

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[2] Telecommunications Act of 1996, Pub. L. no. 104-104, 110 Stat. 56, approved February 8, 1996 [hereinafter "Telecommunications Act"]

Association of Retail Dealers of America, and the National Retail Federation. CERC and its members played a key role in seeking the recent enactment of Section 629A of the Telecommunications Act, so as to achieve competitive availability of equipment providing access to services of Multichannel Video Program Distributors.

II. THE COMMISSION SHOULD CLARIFY THAT THE OPEN VIDEO SYSTEM REGULATORY FRAMEWORK CAN BE USED SOLELY BY COMMON CARRIERS TO PROVIDE "CABLE SERVICE"

Section 302 of the Telecommunications Act establishes a new section Part V of Title VI of the Communications Act of 1934 ("Communications Act").[3] Section 653 provides that if a telephone company agrees to comply with certain non-discrimination and other requirements established by the Commission, it will be considered an open video system ("OVS") provider and will be exempt from regulation under Title II and entitled to significantly reduced regulation under Title VI.[4] In addition, the Telecommunications Act allows cable system operators or other persons to provide video programming through an open video system subject to such regulations as the Commission may prescribe.[5]

The Commission initiated this proceeding to establish regulation necessary to implement the "new framework for entering the video marketplace"

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[3] Communications Act of 1934, 47 U.S.C. sec. 151 *et. seq.* [hereinafter "1934 Act"].

[4] Id. sec. 651(a)(3)-(4).

[5] Id. sec. 651(a)(2).

adopted by Congress in Section 653 of the Telecommunications Act.[6] As demonstrated below, Congress intended that this new framework be used to allow common carriers to provide multi-channel video programming and information services. Congress did not intend to allow carriers to use this framework to provide basic telecommunications. Nor did Congress intend to allow incumbent cable systems to use the open video system framework as a means to avoid the comprehensive and carefully crafted regulatory regime established in Title VI of the Communications Act. Rather, Congress intended to allow cable systems to provide video programming on a common carrier's open video system.

A. A Common Carrier May Provide "Cable Service" -- But Not Telecommunications Service -- as an Open Video System Provider

Congress created the open video system ("OVS") regulatory framework in order to encourage common carriers to enter the "entertainment and information markets."[7]

The Telecommunications Act therefore provides that common carriers, in their capacity as OVS operators, may offer to subscribers multichannel video programming services and enhanced services. The Telecommunications Act of

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[6] *Notice* ¶ 4.

[7] *See* H. Conf. Rep. No. 458, 104th Cong., 2d Sess. 178; *see id.* at 177 (1996) ("The conferees recognize that telephone companies need to be able to choose from among multiple video entry options to encourage entry . . . .").

1996, however, makes clear that a common carrier acting under the OVS regulatory framework is prohibited from offering telecommunications services.

The extent to which a carrier can use the OVS framework to provide services is clearly defined by the statute. Section 302 of the Act states that "[a] local exchange carrier may provide *cable service* . . . through an open video system that complies with this section."[8] The definition of "cable service," as revised by the new legislation, includes the provision of multichannel video programming, interactive information services, and other enhanced services.[9]

The definition of "cable service," however, does not include basic telecommunications services. As the Conferees made clear, the expanded definition of "cable service" does not include basic telecommunications service or dial-up access to information services over telephone lines[10] As a result, an OVS operator may not offer basic telecommunications services under the OVS regulatory framework. To the extent that a common carrier provides telecommunications service -- such as video conferencing or access to video-based

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[8] *See* Telecommunications Act of 1996 § 302(a) (creating new Section 653(a)(1) of the Communications Act of 1934) (emphasis added).

[9] *See* Telecommunications Act of 1996 § 301(a)(1) (amending Section 602(6)(B) of the Communications Act of 1934). As the Conference Committee Report stated, the revised definition of cable service is intended "to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services." H. Conf. Rep. No. 458 at 169.

[10] *Id.*

Internet files -- the carrier must do so in accordance with Title II of the Communications Act.[11]

B. Cable System Operators May Not Evade Cable Regulation By Recasting Themselves as Open Video System Operators

The *Notice* seeks comment on the whether the Telecommunications Act permits cable operators to become OVS operators or whether they may be only authorized to provide video programming on others' open video systems.[12] The Act permits the Commission, if consistent with the public interest, to allow OVS carriage of cable-system-provided multichannel video programming.[13] Congress did not intend, nor does the Telecommunications Act permit, the Commission to certify cable systems operators as open video system operators.

Congress plainly intended to limit cable system use of the OVS framework. As the Commission has recognized, the statutory language clearly

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[11] In the *Notice*, the Commission seeks comment on whether OVS operators should be permitted to bundle various communications services, including local and long-distance telephone service, multichannel video programming delivery, and data transmission. *See Notice* at ¶ 66. If the Commission decides to permit such bundling, any OVS operator that offers telecommunications services would still be required to do so pursuant to Title II regulation. Furthermore, customer premises equipment used in conjunction with carrier-provided telecommunications services would remain subject to the Commission's unbundling rule. *See infra* Part III.A.

[12] *See* Notice at ¶ 64.

[13] *See* Telecommunications Act § 302(a) (creating new Section 653(a)(1) of the Communications Act of 1934).

distinguishes between common carriers and cable system operators.[14] Section 653(a)(1) authorizes local exchange carriers to provide "cable service through an open video system."[15] In contrast, the Act requires the Commission to make a public interest determination prior to allowing cable operators to use this regulatory framework.[16] Moreover, the Act expressly limits a cable operator to providing "*video programming*" through an OVS.[17] The Commission is obligated to adopt regulations that reflect this distinction by limiting the role of cable systems to that of a *user* of carrier-provided OVS service.

The legislative history confirms that Section 653 is not intended to allow cable systems to transform themselves into open video systems. As the Conference Committee Report states, this provision "focuses on the establishment of open video systems by *local exchange carriers*."[18] Indeed, the Report does not even mention the possibility that a cable system could provide service as open video systems.

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[14] Notice at ¶ 64.

[15] Telecommunication Act § 302(a) (creating new Section 653(a)(1) of the Communications Act of 1934) (emphasis added)).

[16] *See id.*

[17] *Id.*

[18] H. Conf. Rep. No. 458 at 177 (emphasis added); *see id.* at 172 ("[C]ommon carriers . . . may choose to provide an open video system."); *see also* Telecommunication Act § 302(a) (creating new Section 651(a)(4) of the Communications Act of 1934) (A "common carrier" may offer video programming as an open video system.).

Allowing cable systems to act as open video systems plainly would not further the goals of Section 653. The Conference Committee Report explains that the OVS framework is intended to introduce "vigorous competition in the entertainment and information markets" by encouraging "common carriers to deploy open video systems." Because common carriers will be "new" entrants," Congress decided to impose "lighter regulation burdens" that would "level the playing field" between the carriers and the incumbent providers.[19]

Incumbent cable operators plainly are not "new entrants" into the video programming marketplace. Therefore, there is no basis on which to conclude that Congress intended to "lighten" the regulatory burdens imposed on them. To the contrary, allowing cable system operators to recast themselves as open video systems would undermine the carefully crafted regulatory regime that Congress has adopted for cable systems.

Pursuant to Section 624(a) of the Communications Act, as amended, the Commission is developing regulations designed to "assur[e] compatibility between televisions and video cassette recorders and cable systems."[20] If a cable system were allowed to become an OVS, it would no longer be subject to these rules. This does not mean that OVS providers should not also be required to observe Section 624(a) of the Communications Act. In fact, it is important that all

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[19] H. Conf. Rep. No. 458 at 178.

[20] 47 U.S.C. § 544a(b).

navigation devices designed for use with cable systems be equally at home with OVS.

Surely the Commission needs no reminder of the ubiquitous compatibility problems between cable systems and consumer electronics equipment that were an impetus behind the passage of the Cable Act.[21] These difficulties include cable subscribers who are unable to use the remote controls provided with their TV or VCRs; watch one program while taping another, or enjoy the picture-in-picture capabilities of their TV sets, all because of the manner in which their cable service is delivered. Meanwhile, market competition in consumer-end hardware was foreclosed by the bundling of converter boxes into the price of cable service.[22]

If cable providers were allowed to qualify as OVS providers no longer subject to section 624(A) of the Communications Act, nothing would inhibit them from again providing services in such a way as to impede existing consumer electronics product features. We cannot envision a rationale for recreating such an environment. To do so would subvert Telecommunications Act's goal of promoting competitive availability, and fly in the face of the Commission's

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[21] See Comments of the Consumer Electronics Group of the Electronic Industries Association, ET Docket No. 93-7 (filed May 22, 1993) (responding to *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992, Compatibility Between Cable Systems and Consumer Electronics Equipment*).

mandate to act in the public interest. There is no indication of specific intent on the part of Congress to dismantle the Cable Act and the entire cable regulatory structure. Indeed the purpose of sec. 653(a) was to encourage competition from new market entrants, not to favor incumbent cable operators.[23]

III. UNBUNDLING REQUIREMENTS SHOULD APPLY TO OPEN VIDEO SERVICES PROVIDERS.

In the *Notice*, the Commission observed that if OVS operators bundle multiple services, consumer choice could be hampered. Specifically, the Commission noted that bundling may restrict consumers who "may wish to continue purchasing only an individual unbundled service."[24] These consumer concerns are equally relevant to the customer premises equipment market. If an OVS operator bundles CPE and services, consumers will be forced to accept operator-selected equipment instead of choosing the equipment that best meets their needs.

In order to prevent this result, the Commission should prohibit OVS operators from bundling OVS service with CPE. Adoption of an unbundling rule is consistent with Congress' support, as manifested in the 1996 Telecommunications Act, strong unbundling rules in both the cable and basic telecommunications markets. CPE unbundling also is necessary to implement Congress' directive to

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[23] See Telecommunications Act of 1996 Conference Report, S. Rep 104-230 at 178 (February 1, 1996) ("Conference Report").

[24] *Notice* at ¶ 66.

prescribe regulations that will prohibit discrimination against non-OVS-operator-affiliated video programming providers.

A. Congressional Policy Favors Unbundling of Customer Premises Equipment

The Telecommunications Act embodies a strong congressional commitment to CPE unbundling. Section 304 of the Act states that the Commission's existing CPE unbundling rule will continue to apply to CPE used in connection with "basic common carrier communications service" -- such as that customarily provided by telephone networks.[25] That provision also extends the unbundling requirement to CPE used in connection with multichannel video programming services.[26]

According to the Conference Committee Report, Section 304 requires the Commission to "ensure that consumers are not forced to purchase or lease a specific, proprietary converter box, interactive device, or other equipment from the cable system or network operator" that provides multichannel video programming

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[25] *See* Telecommunications Act § 304 (creating new Section 629(d)(2) of the Communications Act of 1934).

[26] Section 304 of the Act directs the Commission to prescribe rules that promote the "commercial availability . . . [of] equipment used by consumers to access . . . multichannel video programming and other services offered over multichannel video programming systems." Telecommunications Act § 304 (creating new Section 629 of the Communications Act of 1934).

service.[27] To do so, Congress directed the Commission to require providers of multichannel video programming service to provide CPE on an unbundled basis.

The multichannel video programming unbundling requirements contained in Section 304 apply to OVS operators. Congress directed that certain provisions of the Communications Act that "appl[y] *to a cable operator*" should not apply to OVS operators.[28] The CPE unbundling provision of Section 304, however, is not a provision applicable only to a "cable operator." Rather, Congress expressly made clear that this provision applies to all "multichannel video programming services providers."[29] Thus, OVS operators, as "multichannel video programming services providers," are obligated to unbundle OVS CPE from the provision of programming service. Even if Section 304 is not directly applicable to OVS operators, however, any rules adopted by the Commission governing OVS

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[27] H. Conf. Rep. No. 458, 104th Cong., 2d Sess. 181 (1996). The Commission has recognized that consumers will benefit from a competitive market for CPE used in connection with multi-channel video programming services. For example, in the *Cable Compatibility Order*, the Commission noted that:

> opening [the cable CPE] markets to competitive equipment providers will give product developers and manufacturers, as well as cable system operators, the ability and incentives to introduce new products and to respond to consumer demand. In return, consumers will have greater access to technology with new features and functions.

Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992, First Report and Order, 9 FCC Rcd 1981, 1982 (1994), *petitions for recon. pending*.

[28] Telecommunications Act § 302(a) (creating new Section 653(c)(1) of the Communications Act of 1934).

[29] *Id.* at § 304.

operators should be consistent with the strong congressional policy favoring CPE unbundling.

B. An OVS Unbundling Rule is Necessary to Fulfill the Commission's Express Statutory Obligation to Prevent Discrimination Against Non-Affiliated Programming Providers

In enacting the open video system regulatory framework, Congress recognized that an open video system might "discriminat[e] among video programming providers with regard to carriage on its open video system."[30] Congress also recognized the danger that an OVS operator might omit program listings from any "navigational device" provided by the operator.[31] Congress therefore required the Commission to adopt rules designed to ensure that conditions for carriage of programming provided by non-affiliated multichannel video programming providers "are not unjustly or unreasonably discriminatory."[32] Congress also directed the Commission to adopt rules to prevent discrimination in regard to program listings on any "navigational device.[33]

If OVS operators are allowed to bundle CPE, they will almost certainly be able to discriminate against non-affiliate programmers. For example, if an OVS operator were to require all subscribers to purchase a set-top box, the operator

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[30] Telecommunications Act at § 302(b) (creating new Section 653(b)(1)(A) of the Communications Act of 1934).

[31] *Id.* (creating new Section 653(b)(1)(E)(iv) of the Communications Act of 1934).

[32] *Id.* (creating new Section 653(b)(1)(A) of the Communications Act of 1934).

[33] *Id.* (creating new Section 653(b)(1)(E)(iv) of the Communications Act of 1934).

could generate sufficient revenue to allow it to cross-subsidize its video content offering, and thereby place competing programmers at a competitive disadvantage. Alternatively, an OVS operator could require subscribers to purchase a set-top box or other premises-based equipment that interoperate more effectively with its video programming service than with the services provided by its competitors.

To be sure, the Commission could adopt rules barring such discriminatory practices. Were the Commission to do so, it would still be obligated to expend scarce Commission resources on policing OVS operators' efforts to use control over CPE to obtain a discriminatory advantage. CEMA and CERC believe that a far more effective way to bar discrimination against non-affiliated content providers is to adopt a rule requiring OVS operators to unbundle CPE.[34]

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[34] Section 304 of the Telecommunications Act also authorizes the Commission to take any actions necessary to deter cross-subsidization of CPE used in conjunction with multichannel video programming services. *See* Telecommunications Act § 304 (creating new Section 629 of the Communications Act of 1934) (Multichannel video programming operators may sell or lease CPE to subscribers, provided that the "operator's charges to consumers for such . . . equipment are separately stated and *not subsidized* by charges for . . . service" provided by the network operator).

III. CONCLUSION

For the foregoing reasons, CEMA and CERC urge the Commission to clarify that the OVS regulatory framework may be used solely by common carriers seeking to provide "cable service," and that cable systems may only act as *users* of carrier-operated OVS systems. The Commission also should adopt regulations preventing OVS operators from bundling customer premises equipment.

Respectfully submitted,

Electronic Industries Association
Consumer Electronics Manufacturers Association

By: Gary Shapiro /ADK
Gary Shapiro
President
Consumer Electronics
Manufacturers Association

2500 Wilson Boulevard
Arlington, Virginia 22201
703-907-7600

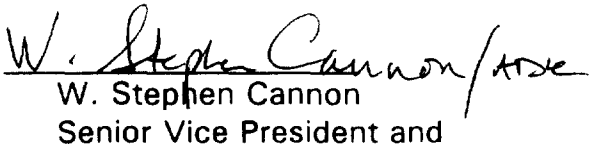
Consumer Electronics Retailers Coalition

By: John V. Roach /ADK
John V. Roach
Chairman and
Chief Executive Officer

Ronald L. Parrish /ADK
Ronald L. Parrish
Vice President of
Corporate Development

Tandy Corporation
1800 One Tandy Center
Fort Worth, Texas 76102
(817) 390-3779

Richard L. Sharp
Chairman, President and
Chief Executive Officer



W. Stephen Cannon
Senior Vice President and
General Counsel

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9950 Mayland Drive
Richmond, Virginia 23233
(804) 527-4014

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